

DK06-0120

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STATE OF MONTANA

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MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY  
No. DC-06-60

STATE OF MONTANA,	)	Judge E. Wayne Phillips
	)	
Plaintiff,	)	
	)	<u>ORDER ON MOTION FOR</u>
vs.	)	<u>FOR RECUSAL AND</u>
	)	<u>ORDER OF REFERRAL</u>
TERRENCE RICHARDSON PASSMORE,	)	
	)	
Defendant.	)	

Defendant has moved for recusal and disqualification. The Defendant's Motion for Recusal is **Denied**.

Pursuant to Mont. Code Ann. § 3-1-805, this Court hereby refers the Defendant's Motion for Disqualification in Cause No. DC-06-60 (Sixth Judicial District Court, Park County) to the Montana Supreme Court.

The Clerk of Court is directed to file this Order On Motion For Recusal And Order Of Referral and provide copies to counsel of record.

DATED this 17 day of April 2007.

E. Wayne Phillips  
DISTRICT COURT JUDGE  
Hon. E. Wayne Phillips  
P. O. Box 1124  
Lewistown, Montana 59457  
Telephone: (406) 538-8028  
Facsimile: (406) 538-5076

c: Montana Supreme Court  
c: Carlo J. Canty, Esq.  
c: Herman A. Watson, Esq.

FILED

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Ed Smith  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

COPY

HERMAN A. "CHUCK" WATSON, III  
Trial Lawyer  
1700 W. Koch St., Ste. 2  
Bozeman, Montana 59715-4148  
Telephone: (406) 586-4707  
Facsimile: (406) 582-0836

received  
4-12-07

Attorney for Defendant,  
Terence Richardson Passmore

**MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY**

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STATE OF MONTANA,	)	Cause No. DC-06-60
	)	
Plaintiff,	)	DEFENDANT'S MOTION
	)	FOR RECUSAL OR
vs.	)	DISQUALIFICATION OF
	)	JUDGE AND BRIEF IN
TERENCE RICHARDSON PASSMORE,	)	SUPPORT
	)	
Defendant.	)	
	)	

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COMES NOW the Defendant, Terence Richardson Passmore, by and through his attorney of record, Herman A. Watson, III, and submits this Motion for Recusal or Disqualification of Judge E. Wayne Phillips pursuant to § 3-1-805, MCA. This Motion is supported with an Affidavit and Certificate of Good Faith, appended Exhibit A and Exhibit B, respectively, and incorporated herein by reference.

**STATEMENT OF FACTS**

Judge Phillips denied Defendant's suppression motion without affording him the opportunity to make an offer of proof or protect the record for an appeal of that ruling at the hearing on February 9, 2007. Defendant was forced to file a Petition for Writ of Supervisory Control to attain a full evidentiary hearing on the motion. The Writ was granted on April 4,

2007, because the Montana Supreme Court was concerned that “without a record of an evidentiary hearing in the District Court, and a resultant ruling, Passmore is ‘out of luck’ in terms of an appeal.” (Order No. OP 07-0177, p. 2). The Court determined that the right of a meaningful appeal should be preserved under the circumstances and remanded the case to the District Court for a full evidentiary hearing on Defendant’s Motion to Suppress.

### **MEMORANDUM IN SUPPORT OF DISQUALIFICATION**

Section 3-1-805, MCA, provides for the disqualification for cause of a district court judge having personal bias or prejudice. That statute provides in pertinent part:

1. Whenever a party to any proceeding in any court shall file an affidavit alleging facts showing personal bias or prejudice of the presiding judge, such judge shall proceed no further in the cause. If the affidavit is filed against a district judge, the matter shall be referred to the Montana Supreme Court. If the affidavit is in compliance with subsections (a), (b), and (c) below, the Chief Justice shall assign a district judge to hear the matter . . .

(a) The affidavit for disqualification must be filed more than thirty (30) days before the date set for hearing or trial.

(b) The affidavit shall be accompanied by a certificate of counsel of record that the affidavit has been made in good faith. An affidavit will be deemed not to have been made in good faith if it is based solely on rulings in the case which can be addressed in an appeal from the final judgment.

(c) Any affidavit which is not in proper form and which does not allege facts showing personal bias or prejudice may be set aside as void.

(d) The judge appointed to preside at a disqualification proceeding may assess attorneys fees, costs and damages against any party or his attorney who files such disqualification without reasonable cause and thereby hinders, delays, or takes unconscionable advantage of any other party, or the court.

The Montana Supreme Court has decided a number of cases involving § 3-1-805, MCA, and its predecessors, that relate to a party’s motion to disqualify a judge based on an allegation of personal bias or prejudice. See: In re Marriage of Markegard, 2006 MT 111, ¶ 20, 332 Mont. 187, ¶ 20, 136 P.2d 532, ¶ 20.

The burden of showing personal bias or prejudice sufficient to disqualify a presiding judge rests upon the claimant. In Re the Marriage of Gahr (1986), 212 Mont. 481, 689 P.2d 257. When considering a motion and affidavit to disqualify a presiding judge, the reviewing judge can take judicial notice of the record under Rule 202(6), MCA. Id. Mere court rulings cannot support disqualification from which an appeal could have been taken. § 3-1-805(1)(b), MCA.

This case involves a court ruling from which an appeal could not have been taken. The District Court ruling in this case could not have been appealed and was salvaged only by the filing of a Petition for Writ of Supervisory Control. It is submitted that the Judge's denial of Defendant's right of appellate review and the Supreme Court's decision on the Writ in his favor constitutes a finding of judicial misconduct which creates the appearance of impropriety and prima facie evidence of bias and prejudice against the Defendant.

Canon 4 states that "[a] judge's official conduct should be free from impropriety and the appearance of impropriety," in all of his activities. Canon 22 addresses a trial court's duty to "scrupulously grant" a litigant's right to appellate review:

In order that a litigant may secure the full benefit of the right of review accorded to him by law, a trial judge should scrupulously grant to the defeated party opportunity to present the questions arising upon the trial exactly as they arose, were presented, and decided, by full and fair bill of exceptions or otherwise; any failure in this request on the part of the judge is peculiarly worthy of condemnation because the wrong done may be irremediable.

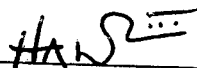
Canon 22, Montana Canons of Judicial Ethics (1963)

The Defendant maintains that after remand, if Judge Phillips is not recused or disqualified, the Judge's actions contrary to the Canons of Judicial Ethics will continue to have an adverse effect on his rights through out the case. Further, judicial misconduct leads to the appearance of impropriety and a significant potential for personal bias and prejudice toward this Defendant. In this case, the Supreme Court has made a finding that impropriety has already been

shown and that the impropriety in violation of Canon 22 would have prejudiced the Defendant, if let to stand. Finally, the matters pertaining to the February 9, 2007 hearing, regarding the Judge's conduct have not been fully resolved, inasmuch as the Defendant continues to have the right to pursue the issue further. That specter will, undoubtedly, continue the possibility, if not likelihood, that the Judge's attitude toward the Defendant will be biased.

THEREFORE, the Defendant requests that the Court disqualify itself, and issue a request that the Supreme Court appoint another trial judge.

DATED this 11<sup>th</sup> day of April, 2007.

  
HERMAN A. WATSON, III  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

This is to certify that a true and accurate copy of the foregoing DEFENDANT'S MOTION FOR RECUSAL OR DISQUALIFICATION OF JUDGE AND BRIEF IN SUPPORT was mailed the same day, addressed as follows:

Hon. E. Wayne Phillips  
P.O. Box 1124  
Lewistown, MT 59457-1124

Carlo J. Canty  
Assistant Attorney General  
Special Deputy Park County Attorney  
P.O. Box 201401  
Helena, MT 59620-1401

  
Sheila Royston, Paralegal

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**MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY**  
 \* \* \* \* \*

<b>STATE OF MONTANA,</b>	)	<b>Cause No. DC-06-60</b>
	)	
<b>Plaintiff,</b>	)	<b>AFFIDAVIT OF</b>
	)	<b>HERMAN A. WATSON, III</b>
<b>vs.</b>	)	
	)	
<b>TERENCE RICHARDSON PASSMORE,</b>	)	
	)	
<b>Defendant.</b>	)	

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STATE OF MONTANA     )  
                                   ) ss:  
 County of Gallatin     )

HERMAN A. WATSON, III, being first duly sworn upon his oath, deposes and says:

1. I am an attorney licensed to practice law in the State of Montana specializing in criminal defense and I represent the Defendant, Terence Passmore, as counsel of record in the above-entitled case.
2. Several allegations of Judicial Misconduct were made against Judge E. Wayne Phillips in a Petition for Writ of Supervisory Control to the Montana Supreme Court that was filed on March 7, 2007.
3. Passmore's Petition for Supervisory Control was granted by our State Supreme Court on April 4, 2007, and remanded for a full evidentiary hearing on his Motion to Suppress.

4. The Montana Supreme Court's ruling on the Writ (Order No. OP 07-0177) in Defendant's favor constitutes a finding of violations of the Canons of Judicial Ethics by Judge E. Wayne Phillips in connection with this case.

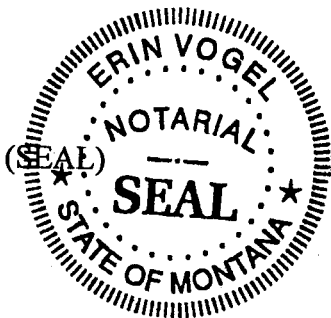
5. Affiant believes that such judicial misconduct by Judge E. Wayne Phillips raises the appearance of impropriety and generates a genuine potential for future bias and prejudice against Defendant Passmore.

DATED this 11<sup>th</sup> day of April, 2007.

HAWSE  
HERMAN A. WATSON, III, Affiant

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SUBSCRIBED AND SWORN to before me 11th day of April, 2007.



Erin Vogel  
Notary Public for the State of Montana  
Print Name: ERIN Vogel  
Residing at Three Forks, Montana  
My commission expires: 12/9/2009

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## MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

\*\*\*\*\*

STATE OF MONTANA,

Plaintiff,

vs.

TERENCE RICHARDSON PASSMORE,

Defendant.

Cause No. DC-06-60

CERTIFICATE OF  
GOOD FAITH

I, Herman A. Watson, III, counsel of record for the Defendant, Terence Passmore, hereby certify in accordance with § 3-1-805, MCA, that the foregoing Motion for Recusal or Disqualification and supporting Affidavit have been made in good faith.

DATED this 11<sup>th</sup> day of April, 2007.

HAWSON  
HERMAN A. WATSON, III  
Attorney for Defendant

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## CERTIFICATE

STATE OF MONTANA  
6TH JUDICIAL PRECINCT } ss.  
COUNTY OF PARK

I hereby certify that this sheet and all attached sheets identified by impression of my Official Seal, are each and all true and correct copies of originals filed in my Office in

DC

Case No.

06-60

Witness my hand and official seal this

18 day of April, 2007

JUNE LITTLE  
Clerk of District Court for  
Park County, Montana

By

Clara Swandel  
Deputy Clerk